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U.S. Department of Justice
Office of
The Deputy Attorney General

Washington, D.C. 20530

February 1, 1985

TO: John Roberts

FROM: Roger Clegg

Per our conversation this morning.

Attachment

BACKGROUND
ON
DEVERAUX v. GEARY

Event: On February 1, 1985, the Department of Justice filed a friend of the court brief with the First Circuit Court of Appeals on behalf of five white plaintiffs challenging the quota requirements of a court decree on the basis of the Supreme Court's decision last year in Memphis Firefighters v. Stotts. Civil rights groups may criticize us for this.

I. Facts: On July 16, 1984, five white police officers employed by the Massachusetts Metropolitan District Commission challenged under the Equal Protection Clause the promotion of a less qualified black officer over them, pursuant to the quota provisions of a court decree entered in 1979. The district court held that the officers were barred from bringing this suit because it would call into question the validity of the quota decree. The court also held that they could not intervene in the original case which entered the decree because the intervention was "untimely." In the court's view, intervention would have been timely only if the officers had intervened before the quota judgment was entered in 1979. Finally, the court held that the Stotts decision did not prohibit quota relief and thus was not an unusual circumstance requiring that intervention be permitted.

II. Position of the U.S.: The United States maintained that the court's refusal to give the white plaintiffs their day in court was a palpably unjust denial of their constitutional due process rights. More important, the district should be reversed because Stotts clearly made unlawful all court-ordered quota relief.

III. Anticipated Criticisms and Planned Department of Justice Responses:

Criticism: The Reagan Administration is opposing employment quotas that are an effective remedy for past discrimination.

Response: Employment quotas are both wrong and, as Stotts makes clear, illegal. The fundamental principle embodied in our Constitution and civil rights laws is that race is an irrelevant charteristic that should never be used as a basis for treating people differently. This is true regardless of whether the person being hurt is white or black. More discrimination is simply not the way to end discrimination.

Criticism: The Reagan Administration is incorrectly interpreting Stotts to prohibit all quota relief.

Response: The Supreme Court in Stotts quite clearly held that no quota relief or other techniques that grant racial preferences can be ordered by a court, stating "Title VII does not permit the ordering of racial quotas." Thus, the court-ordered quota in this case is clearly illegal under Stotts.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-2004

ROBERT T. DEVERAUX, et al.,

Plaintiffs-Appellants

v.

WILLIAM J. GEARY, et al.,

Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether the district court erred in refusing to consider the merits of an action brought under the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. 1981 by five white police officers to challenge the promotion of a black officer who scored lower on a competitive promotional examination.

INTEREST OF THE UNITED STATES

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., prohibits, inter alia, racial discrimination in employment. Under Section 706(f)(1) of the Act, 42 U.S.C. 2000e-5(f)(1), the Attorney General is responsible for the enforcement of Title VII in cases such as this one where the employer is a government, governmental agency, or political subdivision.

in an effort to comply with the "minority employment objectives" set forth in the consent decree in Culbreath v. Dukakis, No. CA 74-2463-F (D. Mass., Aug. 27, 1979) (App. 133-134; see App. 52-122). 3/ Under that decree, various state agencies, including MDC, are required to establish a special minority eligibility list for each job category covered by the decree, and to select applicants from that list rather than from the usual civil service eligibility list when necessary to meet or maintain the decree's minority employment objectives for the agency and job category (see App. 80). The plaintiffs in this case claimed that, but for their race, one of them would have been selected for the provisional captain position rather than Callender, and that Callender's selection therefore violated their right of equal protection as guaranteed by the Fourteenth Amendment and 42 U.S.C. 1981 (App. 6).

The district court found that the Deveraux plaintiffs' suit was "in essence an attack on the Culbreath consent decree" and therefore treated their action as "an attempt to intervene in that case" (App. 136). In determining whether to permit intervention, the district court relied on Culbreath v. Dukakis, 630 F.2d 15 (1st Cir. 1980), in which this Court denied intervention to seven unions seeking to mount a facial challenge to the quotas in the consent decree. In Culbreath, the Court adopted the four-pronged test of Stallworth v. Monsanto Co., 558 F.2d 257 (5th Cir. 1977), for

3/ This consent decree resolved a complaint filed sub nom. Jackson v. Sargent (see App. 15-35), but referred to herein as the Culbreath complaint.

determining the timeliness of a petition for intervention: (1) the length of time the would-be intervenors knew or reasonably should have known of their interest in the litigation before petitioning to intervene; (2) the prejudice to existing parties if intervention is granted; (3) the prejudice to the would-be intervenors if intervention is denied; and (4) the existence of unusual circumstances militating either for or against intervention.

With respect to the first prong of the Stallworth test, the district court indicated that "if it was unreasonable for the labor unions in [Culbreath] to intervene more than four years after the complaint was filed, it is even more unreasonable to permit the [Deveraux] plaintiffs to intervene now, more than ten years after the complaint was filed" (App. 137). Noting that "the goals and mechanisms sought by the complaint in Culbreath were well publicized" (ibid.), the court could conceive of no reason "why these police officers were not aware of and should not be bound by the Culbreath decree" (ibid.).

As to prejudice, the court noted that the Deveraux plaintiffs' success "would constitute an extreme example of 'last minute disruption of painstaking work by the parties and the court'" (App. 138) since "[its] effect [would] be to disallow implementation of the consent decree" (App. 137-138), and found that "[n]othing could more clearly prejudice the interests of the existing parties" (App. 138). On the issue of prejudice to the

would-be intervenors, the district court again indicated that "[a]bsent some unusual circumstance, the holding in Culbreath must govern this case" (App. 139). Noting that "racial preference schemes are an accepted means of remedying past discrimination in our society" (App. 138, quoting Culbreath, supra, 630 F.2d at 23), the district court concluded that here, as in Culbreath, the prejudice to the intervenors is "as slight as their likelihood of success on the merits" (App. 139).

The court finally addressed the question whether the Supreme Court's recent decision in Stotts is an unusual circumstance militating in favor of intervention and outweighing the factors militating against intervention. The court rejected plaintiffs' argument that Stotts precludes quota relief under Title VII, stating that "[h]ad the [Stotts] Court meant to rewrite Title VII law to mean that all affirmative action programs are improper absent a finding of actual past discrimination, it would have said so" (App. 141). The court read Stotts as invalidating only the court-ordered layoff quota imposed subsequent to entry of the consent decree in that case, not the decree's underlying affirmative action program, and found a "clear implication" in Stotts that "the actual remedy that was provided by the [Stotts] decree was valid and did not exceed the bounds of Title VII, although the subsequent displacement of white employees was invalid" (App. 142). While conceding that the passages from the legislative

history of Title VII relied upon by the Supreme Court in Stotts "are extremely broad reaching," (App. 142), the district court determined that because the "context of the Court's discussion * * * is a consideration of a competitive seniority award," the Stotts decision "is simply inapplicable to this case" (App. 142, 143). Accordingly, the Court denied the Deveraux plaintiffs' attempt to intervene as untimely and dismissed their complaint (App. 143-144).

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs filed their complaint in this action six days after the challenged promotion took place and less than five weeks after the defendants announced that the position was to be filled by a minority applicant. Finding that plaintiffs' action constituted an impermissible attack on the Culbreath consent decree, the district court treated it as an attempt to intervene in the Culbreath litigation. Emphasizing particularly that more than ten years had elapsed since the filing of the complaint in Culbreath, the district court concluded that there was no good reason "why these police officers were not aware of and should not be bound by the Culbreath decree" (App. 137), and denied intervention as untimely.

This case thus brings into sharp focus the dilemma created by the parallel operation of two contemporary developments in American law. On one side is the "collateral attack doctrine," which bars claims challenging conduct required or authorized by an extant consent decree, even though the claimants were not parties either to the decree or to the litigation in which it was

entered. Indeed, the collateral attack doctrine requires dismissal of a complaint asserting a cause of action that had not even accrued when the consent decree was entered.

The doctrine's operation is perhaps best illustrated by the example of an employment discrimination case in which a consent decree is entered, imposing class-based preferential treatment such as hiring or promotion quotas. A subsequent complaint challenging the lawfulness of a selection made pursuant to the decree's preferential provisions would be dismissed as an impermissible collateral attack on the decree. 4/

On the other side of the dilemma are the rules governing the timeliness of intervention in an on-going litigation. Under these rules, a typical application of these rules, the would-be intervenor is required to see into the future, to speculate on what his interests are likely to be and to assess whether any of the likely outcomes of the on-going litigation will adversely affect that speculative interest. If he concludes (or should have concluded) that the litigation may well adversely affect that speculative interest, he must retain counsel and seek to intervene in the case to litigate his claim, even though the claim at that point has not yet accrued (and may never accrue) and is (probably) so speculative that he lacks standing to raise it. But if he delays his attempted intervention in the litigation until his speculative interest becomes real and that

4/ See, e.g., Thaggard v. City of Jackson, 687 F.2d 66, 68-69 (5th Cir. 1982), cert. denied sub nom., Ashley v. City of Jackson, 52 U.S.L.W. 3287 (U.S. Oct. 11, 1983).

interest is injured by conduct required as a result of the litigation -- that is, if he waits until he has an accrued cause of action to assert -- he will surely be turned away as untimely, as were plaintiffs in the instant case.

Returning to the example of an employment discrimination litigation, the typical would-be intervenor must, under existing rules of timeliness, predict his future employment interests, taking into account a host of speculative, indeed unknowable, factors and variables. If imposition of a promotion quota is a likely outcome of the litigation, the would-be intervenor must (1) determine what promotional opportunities will likely arise in the future; (2) weigh his own personal interest and aptitude for any such promotional opportunities; (3) determine his competitive chances for any such promotion; (4) and so forth. He then must determine such things as whether the litigation will be successful, whether it will result in relief affecting future promotions, and whether any such relief is likely to adversely affect his promotional prospects in the future.

Determining the answers to these unknowables is difficult enough for a person who is an incumbent employee when the employment discrimination suit is filed against the employer. But the universe of would-be intervenors who must predict the future is by no means limited to incumbent employees. Consent decrees entered in employment discrimination cases oftentimes

are operative for a decade and more. A promotion quota, therefore, could well disadvantage a person who had not even entered the work force when the consent decree was entered. Obviously, it would be impossible for such a person to make the judgments about future events required under current rules governing timeliness of intervention. 5/

But intervention may not be granted even to the would-be intervenor who is prescient enough to foresee future events and to determine that the employment discrimination litigation against his employer will likely result in a consent decree imposing a promotion quota that will likely adversely affect his future promotional prospects. His petition is apt to be denied on the entirely reasonable ground that his claim -- i.e., that he may be a competitor for a promotion that may open up in the future and that his interests may be adversely affected by a promotion quota that may be entered as a result of the litigation -- is entirely speculative and thus not ripe for adjudication in federal court. 6/ His petition is

5/ The record in this case does not disclose whether plaintiffs, or any of them, were employed by defendant when the Culbreath consent decree was entered over five years ago.

6/ See Firebird Society v. Board of Fire Commissioners, 66 F.R.D. 457 (D. Conn.), aff'd without opinion, 515 F.2d 504 (2d Cir.), cert. denied, 423 U.S. 867 (1975).

also apt to be denied on the often less reasonable ground that his interests are being adequately represented by an existing party to the litigation, perhaps his employer, 7/ perhaps his union, 8/ perhaps another nonminority party. 9/ But if he delays his attempt to intervene until a proposed consent decree is made public, which is typically when he would first learn whether his interests could conceivably be affected and how "adequately" those interests are being represented, he is likely to be denied intervention as untimely. E.g., Culbreath, supra.

Thus, even if it were reasonable to require would-be intervenors to foresee future events in the manner described above and to seek intervention in an on-going case to advance speculative and unripe claims, it is clear that the decisional law on the question of timeliness to intervene in on-going cases yields no reasonably predictable rules under which persons may act to protect rights that may be compromised in some way by the litigation. It is a classic Catch-22.

7/ E.g., Pennsylvania v. Rizzo, 530 F.2d 201 (3d Cir.), cert. denied, 426 U.S. 921 (1976).

8/ E.g., Bolden v. Pennsylvania State Police, 578 F.2d 912 (3d Cir. 1978); Telephone Workers Union v. New Jersey Bell Telephone, 584 F.2d 31 (3d Cir. 1978).

9/ E.g., Castro v. Beecher, 459 F.2d 725, 729 n. 2 (1st Cir. 1972); Firebird Society v. Board of Fire Commissioners, supra, note 6.

When coupled with the collateral attack doctrine, however, the rules governing timeliness of intervention form a kind of jurisdictional pincers movement, often denying would-be plaintiffs/intervenors any opportunity to be heard -- the quintessence of a denial of due process. E.g., Hansberry v. Lee, 311 U.S. 32, 40 (1940); General Foods v. Massachusetts Dept. of Public Health, 648 F.2d 784, 787 (1st Cir. 1981) ("The due process clauses of the Fifth and Fourteenth Amendment protect a nonparty from being bound by an in personam judgment unless in the underlying litigation he had directly or vicariously a full and fair opportunity to present evidence and argument") (citation omitted). In the instant case, the collateral attack doctrine and the rules governing timely intervention operated in just this fashion, depriving plaintiffs of any forum for adjudication of their claims and, thus, of due process of law.

Our principal submission, therefore, is that plaintiffs, having asserted their claims in federal court within the time allowed to file suit after their causes of action accrued, are constitutionally entitled to be heard on the merits in federal court. Wholly apart from this constitutional argument, however, we also submit that the Supreme Court's recent decision in Stotts provides another, and independent, ground for reversing the district court's denial of intervention. For under a straightforward application of the Stallworth test for determining timeliness, intervention was warranted because the Stotts

decision changes the law on which the class-based preferential relief in the Culbreath decree was based.

ARGUMENT AND AUTHORITY

I.

DUE PROCESS REQUIRES THAT PLAINTIFFS BE PERMITTED EITHER TO MAINTAIN THIS ACTION OR TO INTERVENE IN CULBREATH

A. Plaintiffs should be permitted to maintain this action

In Culbreath this Court stated in dicta that intervention was "the proper procedural recourse" for the would-be intervenor unions, noting that a "[c]ollateral attack on the decree will be impossible because only the district court supervising implementation of the decree will have subject matter jurisdiction to modify the decree" (630 F.2d at 22). The Court weighed the fact that "the unions and their members may be forever foreclosed from challenging the goal mechanisms of the decree" in assessing the prejudice to the unions of a denial of intervention (ibid.). The Culbreath Court's statements, while only dicta, are consistent with a number of cases holding that actions challenging practices allegedly required or authorized by a consent decree in another case are impermissible "collateral attacks" on the decree and must be dismissed on jurisdictional grounds. See Thaggard v. City of Jackson, 687 F.2d 66, 68-69 (5th Cir. 1982), cert. denied sub nom. Ashley v. City of Jackson, 52 U.S.L.W. 3287 (U.S. Oct. 11, 1983); Dennison v. City of Los Angeles Department of Water & Power, 658 F.2d 694, 695 (9th Cir. 1981); Black & White Children of

the Pontiac School System v. School District of the City of Pontiac, 464 F.2d 1030, 1030-1031 (6th Cir. 1972) (per curiam); Burns v. Board of School Commissioners of the City of Indianapolis, 437 F.2d 1143, 1144 (7th Cir. 1971) (per curiam); Prate v. Freedman, 430 F. Supp. 1373, 1374-1375 (W.D.N.Y.), aff'd without published opinion, 573 F.2d 1294 (2d Cir. 1977), cert. denied, 436 U.S. 922 (1978); O'Burn v. Shapp, 70 F.R.D. 549, 552-553 (E.D. Pa. 1976), aff'd without published opinion, 546 F.2d 418 (3d Cir. 1976), cert. denied, 430 U.S. 968 (1977).

The collateral attack doctrine, however, has never been adopted or otherwise endorsed by the Supreme Court. Indeed, the only Justices to address the issue, Justices Rehnquist and Brennan, have rejected the collateral attack doctrine, finding themselves "at a lost to understand the origins of the doctrine of 'collateral attack' employed by the lower courts * * * to preclude a suit brought by parties who had no connection with the prior litigation." Ashley v. City of Jackson, 52 U.S.L.W 3287 (U.S., Oct. 11, 1983) (Rehnquist, J., joined by Brennan, J., dissenting from denial of certiorari). In Ashley, suits were brought by white plaintiffs challenging certain hiring and promotional decisions as racially discriminatory. Finding that the challenged hiring and promotion decisions were the result of consent decrees entered in prior cases, the district court

dismissed the suits as impermissible collateral attacks. The Court of Appeals for the Fifth Circuit affirmed. 10/

In dissenting from a denial of certiorari, Justices Rehnquist and Brennan opined that "the Court of Appeals for the Fifth Circuit erred in holding that a district court cannot entertain a suit challenging practices allegedly mandated or permitted by a prior consent decree * * * ." (ibid.). Noting that plaintiffs' "cause of action did not even accrue until at least a year after the entry of the consent decrees," the Justices found dismissal of the claim inconsistent with the fundamental principle, rooted in our "historic tradition that every one should have his day in court," that "'[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party nor a privy and therefore has never had an opportunity to be heard" (Ibid., quoting Parklane Hosiery Company v. Shore, 439 U.S. 322, 327 n.7 (1979)). The Justices found this principle particularly applicable to a judgment entered by consent, for while a consent decree binds the signatories, it "cannot be used a shield against all future suits by nonparties seeking to challenge conduct that may or

10/ The plaintiffs in Ashley had also attempted to intervene in the consent decree suits in order to challenge the decrees on their face. Intervention was denied as untimely, and the plaintiffs did not appeal. See Ashley, supra, 52 U.S.L.W. at 3287.

may not be governed by the decree" (52 U.S.L.W. at 3287). Accordingly, Justices Rehnquist and Brennan could find "no justification, either in general principles of preclusion or the particular policies implicated in Title VII suits, for the district court's refusal to take jurisdiction over [plaintiffs'] case" (Id. at 3288). 11/

For largely these reasons, the Eleventh Circuit recently rejected the collateral attack doctrine. In United States v. Jefferson County, 720 F.2d 1511 (5th Cir. 1983), the Birmingham Firefighters Association and two of its members sought to intervene in pending lawsuits, contending that class-based racial preferences contained in proposed consent decrees would

11/ The leading commentators on federal practice, Wright, Miller and Cooper, Federal Practice and Procedure, §4458 at 74 n. 38 (1983 Supp.), analyzed the Fifth Circuit's decision in Ashley as follows:

> These actions were dismissed "for lack of subject matter jurisdiction," on the ground that they constituted an impermissible collateral attack on the consent decrees. The court observed that it was not faced with determining whether the plaintiffs were in fact entitled to intervene in the government actions. This disposition is inadequate. * * * Some means of reviewing individual challenges to the legality of the decrees must be afforded. The most that can be said for this case is that it is far more orderly to review the challenges by intervention in the original proceedings, and that the plaintiffs should have appealed the denial of intervention.

have a substantial adverse impact upon them. The district court denied intervention as untimely, and entered the consent decrees. The court of appeals affirmed, concluding that under the four-factor test established in Stallworth v. Monsanto Co., 558 F.2d 257 (5th Cir. 1977), the district court had not abused its discretion in denying intervention.

In discussing the third Stallworth factor -- the extent to which a denial of intervention would prejudice the would-be intervenors -- the Eleventh Circuit addressed for the first time "the preclusive effect a consent decree in a Title VII case might have on one subsequently claiming reverse discrimination." United States v. Jefferson County, supra, 720 F.2d at 1517. Because the doctrines of res judicata and collateral estoppel are designed to "prevent the attack of a prior judgment by parties to the proceedings or by those with sufficient identity of interests with such parties that their interests are deemed to have been litigated in those proceedings," a non-party to the proceedings whose "interests were not represented" cannot be bound by a final judgment, whether entered by consent of the parties or after an adjudication on the merits (Id. at 1517-1518). The Eleventh Circuit expressly rejected the view that any action having a burden on a consent decree is an "impermissible collateral attack" on the decree (id. at 1518):

> We do not follow this path to the extent that it deprives a nonparty to the decree of his day in court to assert the violation of his civil rights. If we refuse to hear a discrimination claim by a person whose interests are not represented in the decree, we create an exception to the limitations we presently place on res judicata and collateral estoppel.

Noting that the would-be intervenors' claims of reverse discrimination did not even accrue until implementation of the decrees had begun, the court observed that they were now free to bring an independent action "asserting the specific violations of their rights" arising out of implementation of the consent decrees (Id. at 1518) With respect to the consent decrees, the court of appeals observed that they

> would only become an issue if the defendant attempted to justify its conduct by saying that it was mandated by consent decree. If this were the defense, the trial judge would have to determine whether the defendant's action was mandated by the decree and, if so, whether that fact alone would relieve the defendant of liability that would otherwise attach. This is, indeed, a difficult question. . . . We should not, however, preclude potentially wronged parties from raising such a question merely because it is perplexing. Id. at 1518-1519 (footnote omitted). 12/

12/ With respect to the binding effect of consent decrees, the court stated (id. at 1518 n. 19):

> The judge must be cautious in approving consent decrees only to the extent that he should be aware the decree is more likely to be of little effect the fewer parties there are in the suit to be bound. The consent decree by definition only binds those who consent (either expressly or impliedly).

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Based upon this analysis, and upon the assumption "that the forum hearing any future suit by the would-be intervenors alleging discrimination would consider their claims carefully" (id. at 1519), the court of appeals concluded that the district court's denial of intervention did not impermissibly prejudice the rights of the would-be intervenors.

We agree with the Eleventh Circuit and Justices Rehnquist and Brennan that the collateral attack doctrine cannot be squared with fundamental principles of due process. The principal justification for precluding actions challenging conduct allegedly required or authorized by a prior consent decree -- to avoid the potential for inconsistent judgments -- is eliminated by a requirement that the latter action be brought in or transferred to the court having jurisdiction over the decree. Accordingly, the judgment of the district court dismissing this action as an impermissible collateral attack should be reversed.

B. If The Court Decides That This Suit Is An Impermissible Collateral Attack On The Culbreath Decree, The Complaint Should Be Deemed An Intervention Motion and Granted

If this Court adopts the collateral attack doctrine, the question becomes whether, viewing their complaint as a motion to intervene in Culbreath, plaintiffs sought to intervene in a timely manner. In this case, the district court, emphasizing that the Culbreath complaint was filed over ten years ago,

found that plaintiffs were aware of and bound by the Culbreath decree (App. 137). But, as this Court noted in Culbreath, when the district court indicated in 1975 that it might allow the intervention of some nonminority employees in the Culbreath litigation, it extended the potential for intervention only to those employees "occupying priority positions on eligibility lists who might not be hired or promoted because of orders resulting from the suit and who were not adequately represented by existing parties." Culbreath, supra, 630 F.2d at 19 n. 7 (emphasis in original). Thus, the district court offered the potential for intervention only to the small group of employees who were at that time in priority positions on eligibility lists and thus knew with certainty that preferential remedies proposed in the Culbreath decree would adversely affect them. 13/

It thus seems clear that almost all, if not all, of the current nonminority employees -- like plaintiffs here 14/ -- could not have intervened during the time that the district

13/ Even this discrete group might not have met the "inadequate representation" requirement since their interests were arguably being adequately represented by the government defendants who, at that point, were contesting the allegations of discrimination. See, e.g., Pennsylvania v. Rizzo, 530 F.2d 501, 505 (3d Cir.), cert. denied 426 U.S. 921 (1976) (government employer adequately represents interests of nonminority employees in discrimination suits because, inter alia, of presumption of adequate representation that attaches to governmental parties). Cf. Sam Fox Publishing Co. v. United States, 366 U.S. 683, 689 (1961).

14/ The record does not indicate if any of the plaintiffs were employed during the pendency of the Culbreath litigation or if they occupied priority positions on any eligibility lists during that period.

court now informs them is the only period during which such intervention would have been "timely"; intervention which, they are also now informed, was their sole avenue for pressing their claims of discrimination. The requirements of timely intervention under Rule 24, Fed. R. Civ. P., do not require such a palpably unjust result, and the requirements of due process do not permit it.

For the reasons previously discussed, if this timely filed action must be dismissed as an impermissible collateral attack on the Culbreath decree, due process requires that the timeliness of plaintiffs' attempt to interevene in Culbreath which should be measured from the time at which their interests were actually affected, or certain to be affected, by the defendants' implementation of the decree -- that is, when their causes of action accrued. This analysis is also compelled by logic. As discussed in detail earlier, supra at 7-11, an individual nonminority employee's interest in a consent decree containing a promotion quota is purely contingent and speculative unless and until it can be determined with certainty that the quota will actually result in his being passed over for promotion in favor of a minority employee. Plaintiffs (assuming they were employed by defendant at the time) had no way of foreseeing whether they would still be employed by defendant, whether they would be interested in a particular promotion, whether they would rank high enough on the eligibility list to compete, or any of a

host of other unknowns that would affect the inquiry. The individual employee's interest cannot properly be said to arise until he knows (or should have known) that the promotion quota will actually operate against him. His promptness in taking action to protect that interest thus must be measured from that point forward, rather than from the time he knew or should have known that a quota remedy would be sought or imposed.

Compelled by due process and by logic, this understanding of the "promptness" factor also flows directly from Stallworth, which was followed by this Court in Culbreath. There, the Fifth Circuit specifically rejected the notion that "the date on which the would-be intervenor became aware of the pendency of the action instead of the date on which he learned of his interest in the case [should] be considered for the purpose of determining whether he acted promptly" (558 F.2d at 264), since "the time that the would-be intervenor first became aware of the pendency of the case is not relevant to the issue of whether his application was timely" (id. at 265). The court reasoned (id. at 264-265):

> [A] rule making knowledge of the pendency of the litigation the critical event would be unsound because it would induce both too much and too little intervention. It would encourage individuals to seek intervention at a time when they ordinarily can possess only a small amount of information concerning the character and potential ramifications of the lawsuit, and when the probability that they will misjudge the need for intervention is correspondingly high. Often

> the protective step of seeking intervention will later prove to have been unnecessary, and the result will be needless prejudice to the existing parties and the would-be intervenor if his motion is granted, and purposeless appeals if his motion is denied. In either event, scarce judicial resources would be squandered, and the litigation costs of the parties would be increased. Such a rule would also mean that many individuals who excusably failed to appreciate the significance of a suit at the time it was filed would be barred from intervening to protect their interests when its importance became apparent to them later on. These effects would be inconsistent with two important purposes of Rule 24: to foster economy of judicial administration and to protect non-parties from having their interests adversely affected by litigation conducted without their participation.

The complaint in Stallworth, a Title VII challenge to the company's use of departmental seniority in determining promotion eligibility, vulnerability to layoffs and rollbacks, and priority for shift and job selection, was filed in April 1973 (id. at 260). Almost two years later, on March 7, 1975, a partial consent decree was entered requiring the company to abolish departmental seniority rights and switch to a system primarily involving plant seniority (id. at 261). As a result, a rollback that had been announced in February was restructured, and on March 17, 1975, the would-be intervenors, who had originally been told they would not be affected by the rollback, were moved to lower-paying jobs (id. at 261-262). They filed a petition to intervene on April 4, 1975, "just under one month after the entry of the March 7 order, and three weeks after they were first affected by the decree" (id. at 262 (emphasis added)). Noting that the evidence in the record suggested that the

would-be intervenors "did not know that their interests might be affected by a lawsuit until March 7" (id. at 267 (footnote omitted)) and that it "cannot be said that they ought to have fathomed the potential impact of this admittedly complex case on their seniority rights at some earlier date" (ibid.), the court of appeals held that "[b]y filing their petition less than one month after learning of their interest in this case, the [intervenors] discharged their duty to act quickly" (ibid.). See also Bolden v. Pennsylvania State Police, 578 F.2d 912, 926 (3d Cir. 1978) (opinion of Garth, J., concurring and dissenting on other grounds) (district court's denial of intervention was abuse of discretion because court measured timeliness from entry of the consent decree, three years previously, rather than by reference to "the events which gave rise to the applicants' claim for relief").

In applying Stallworth's reasoning to this case, the starting point should be the date plaintiffs learned, or should have learned, that the consent decree's quota provisions would actually operate against them, rather than the date they learned, or should have learned, that a quota would be sought by one or more of the parties or imposed by the Court in the Culbreath case. The complaint in this case indicates that the defendants here "undertook to fill" the temporary captain position in question in early June 1984 (App. 5); that they "designated the * * * position as [one] to be filled by a minority" at some unspecified time thereafter (ibid.); and that they awarded the position to Callender

on July 6, 1984 (App. 5-6). It is not clear at what point plaintiffs in this case knew or should have known that they would be passed over for promotion because of the Culbreath decree's quota provisions, but accepting the truth of their allegations, their July 16, 1984, complaint was filed no more than five weeks and perhaps as soon as ten days after that point. Thus, plaintiffs acted promptly to challenge implementation of the Culbreath decree once they learned that the operation of the decree would actually affect them.

To conclude otherwise, as the Stallworth court noted, would be at odds with the purposes of Rule 24 by both disrupting the orderly flow of litigation and adversely affecting nonparties who cannot reasonably be viewed as having tarried in asserting their interests. Such a rule would also create a number of parties who act only as "superfluous spectator[s]" (United Airlines, Inc. v. McDonald, 432 U.S. 385, 394 n. 15 (1977)) to the litigation and would foster the very sort of unnecessary and disruptive intrusion that Rule 24 was designed to prevent.

In view of the plaintiffs' promptness in asserting their claims, no prejudice to the existing parties in Culbreath would result from allowing intervention at this time. The district court determined that such prejudice would result if plaintiffs intervened and prevailed on the merits, "the effect [of which would] be to disallow implementation of the consent decree" (App. 137-138). Putting aside the fact that plaintiffs' success on the

merits would mean that implementation of the decree was unlawful and thus ought well be "disallowed," 15/ the relevant issue "is not how much prejudice would result from allowing intervention, but rather how much prejudice would result from the would-be intervenor's failure to request intervention as soon as he knew or should have known of his interest in the case" (Stallworth, supra, 558 F.2d at 267). The passage of at most five weeks after plaintiffs learned that the promotion quota provisions would actually operate against them could not have prejudiced the Culbreath parties in any way. The district court therefore erred in weighing this factor against plaintiffs in determining the timeliness of their complaint.

On the other side of the prejudice issue, denying plaintiffs intervention in Culbreath would deprive them of any opportunity to press their claims. 16/ As we have shown, this prejudice to plaintiffs would be of constitutional magnitude.

15/ Any intervention by nonminority employees, before or after entry of the consent decree, would seek either to deny or to disrupt implementation of quota relief. Thus, the district court's statement that the existing parties would be "prejudiced" by intervention is simply a restatement of the purpose of the proposed intervention. It cannot reasonably be maintained that a factor indicating that intervention is "untimely" is that the putative intervenors seek to protect their interests by preventing the relief sought in the original complaint or ordered by the consent decree. This would mean that the greater the proposed intervenor's stake in the litigation, the more likely the intervention will be denied as untimely.

16/ Our position on the prejudice to plaintiffs if intervention is denied is premised on the assumption that they must proceed, if at all, by intervening in the Culbreath suit rather than by bringing their own independent action. Of course, if this Court determines that plaintiffs may pursue this lawsuit, they would not be prejudiced by a denial of intervention.

II

THE DISTRICT COURT ERRED IN CONCLUDING THAT THE STOTTS DECISION IS NOT AN UNUSUAL CIRCUMSTANCE WARRANTING INTERVENTION BY PLAINTIFFS

Quite apart from the foregoing argument that plaintiffs are constitutionally entitled to have their claims heard on the merits in federal court, the district court erred in denying intervention under the Stallworth test of timeliness. The district court's error springs from its (1) ruling that the Supreme Court's recent decision in Stotts was not an unusual circumstance warranting plaintiffs' intervention; (2) its finding that the plaintiffs, if allowed to intervene, were unlikely to succeed on the merits of their claim and thus would not be significantly prejudiced if intervention were denied; and (3) its failure to measure plaintiffs' promptness in asserting their rights from the time that the Stotts decision was announced.

A. Stotts Makes Clear that the Promotion Quotas Imposed by the Culbreath Consent Decree Exceeded the District Court's Remedial Authority Under Title VII and Are Thus Invalid

The Culbreath consent decree requires covered state agencies to make racially preferential promotions from a special minority eligibility list of candidates rather than from the usual civil service eligibility list when necessary to meet the decree's "minority employment objectives" (App. 133-134; see App. 52-122). Pursuant to these quota provisions, a black police officer was promoted over plaintiffs, although he ranked below plaintiffs on the civil service eligibility list. Plaintiffs challenge the

promotion, claiming that the promotion quotas in the Culbreath decree were invalidated by the Supreme Court's recent decision in Stotts.

In Stotts, black employees of the Memphis Fire Department brought a class action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. The case was settled before trial and a consent decree was entered. Designed to remedy the Department's past hiring and promotion practices with respect to blacks, the consent decree resulted in substantial increases in minority representation in various job categories within the Department. When the City found it necessary, due to budget deficits, to layoff 40 of the Department's employees, the district court enjoined the City from following its seniority system in determining who must be laid off, insofar as application of the system would decrease the proportion of blacks in those job categories. To comply with the district court's order, the City proposed, and the court approved, a modified plan requiring that layoffs be made in accordance with a racial quota designed to preserve the existing proportion of black employees.

The court of appeals affirmed the district court's layoff order. Reasoning that the district court would have possessed remedial authority under Title VII to order the layoff quota if the plaintiffs' allegations of discrimination had been tried and

proved, and that a court's remedial powers are not diminished when a case is settled by consent decree before trial, the court of appeals concluded that the layoff order was authorized.

The Supreme Court reversed, holding that a trial court's remedial authority under Title VII to award retroactive seniority is limited to actual victims of the defendant's unlawful discrimination. The Court, relying on its earlier decisions in Franks v. Bowman Transportation Co., 424 U.S. 747 (1976), and International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), found this conclusion compelled by the statute's language and legislative history.

The language of Title VII's remedial provision, Section 706(g), in pertinent part provides: "No order of the court shall require * * * the hiring, reinstatement, or promotion of an individual as an employee * * * if such individual * * * was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin * * *." 42 U.S.C. 2000e-5(g). In Stotts, because "there was no finding that any of the blacks protected from layoff had been a victim of discrimination" (104 S. Ct. 2588), the Supreme Court held that "in light of Teamsters, the Court of Appeals imposed on the parties as an adjunct of settlement something [i.e., a layoff quota] that could not have been ordered had the case gone

to trial and the plaintiffs proved that a pattern or practice of discrimination existed" (ibid.).

The Stotts Court expressly reaffirmed that the policy underlying Section 706(g) "is to provide make-whole relief only to those who have been actual victims of illegal discrimination" (ibid.). In discussing at length the legislative history of Section 706(g), the Court noted that during the legislative debates preceding passage of the 1964 Civil Rights Act, opponents of Title VII had charged that "if the bill were enacted, employers could be ordered to hire and promote persons in order to achieve a racially-balanced work force even though those persons had not been victims of illegal discrimination" (id. at 2589 (footnote omitted)). Responses to those charges by supporters of the bill, however, made "clear that a court was not authorized to give preferential treatment to non-victims" (ibid.). The Court emphasized repeated statements in the legislative history by the bill's supporters reflecting Congress' clear intent that "Title VII does not permit the ordering of racial quotas * * *" (ibid., quoting 110 Cong. Rec. 6566 (emphasis added by Court)). 17/ This congressional understanding regarding the remedial powers of courts in Title VII cases was perhaps most succinctly expressed in a bipartisan newsletter prepared by the principal Senate

17/ In addition to the legislative history references cited by the Court in Stotts, see similar statements at 110 Cong. Rec. 1518, 5094, 5423, 6563, 7207 (1964).

sponsors of the bill and distributed to supporters during an attempted filibuster: "Under Title VII, not even a Court, much less the Commission, could order racial quotas or the hiring, reinstatement, admission to membership or payment of back pay for anyone who is not discriminated against in violation of this title" (id. at 2590, quoting 110 Cong. Rec. 14465) (footnote omitted).

From the foregoing, it is clear that Stotts precludes any award of affirmative equitable relief, such as the layoff quota at issue in that case, that confers a preference on individuals who have not been found to have been actual victims of illegal discrimination. See also Williams v. City of New Orleans, 729 F.2d 1554, 1565-1570 (5th Cir. 1984) (en banc) (Higginbotham, J., concurring). The district court here, however, found the Stotts decision distinguishable from the instant case on two grounds.

First, the district court determined that the Stotts decision is "limited to * * * layoffs made in violation of a bona fide seniority system" (App. 143). It is clear from the Court's opinion, however, that the victim-specific limitation on a court's remedial powers under Title VII applies in all cases, not just those in which the prescribed relief affects a bona fide seniority system. As the Court expressly stated, Section 706(g) -- the sole source of authority for the fashioning of judicial relief under Title VII -- empowers the federal courts "to provide make-whole

relief only to those who have been actual victims of illegal discrimination" (104 S. Ct. at 2589 (emphasis added)). And the express victim-specific limitation of Section 706(g) applies by its terms to relief for persons "refused employment or advancement," as well as persons "suspended or discharged" (i.e., laid off).

Second, the court read Stotts as invalidating only the court-ordered layoff quota imposed subsequent to entry of the consent decree in that case, not the decree's underlying affirmative equitable relief, and found a "clear implication" in Stotts that the hiring and promotion requirements of the Stotts consent decree were valid and did not exceed the bounds of Title VII, although the subsequent displacement of white employees was invalid" (App. 142). To be sure, the validity of the underlying consent decree's preferential hiring and promotion requirements was not before the Court in Stotts and, therefore, was not specifically ruled upon. The Court nonetheless addressed the question whether statutory limits on a court's remedial authority apply to remedial orders entered by consent as well as those entered after trial. Prompted primarily by Justice Stevens' observation that "[i]f the consent decree justified the District Court's preliminary injunction, then that injunction should be upheld irrespective of whether Title VII would authorize a similar injunction" (104 S. Ct. 2594) (footnote omitted), the Stotts majority responded (id. at 2587 n. 9):

> "[T]he District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce," not from the parties' consent to the decree. System Federation No. 91 v. Wright, 364 U.S. 642, 651 (1961). In recognition of this principle, this Court in Wright held that when a change in the law brought the terms of a decree into conflict with the statute pursuant to which the decree was entered, the decree should be modified over the objections of one of the parties bound by the decree. By the same token, and for the same reason, a district court cannot enter a disputed modification of a consent decree in Title VII litigation if the resulting order is inconsistent with that statute. 18/

System Federation v. Wright, 364 U.S. 642 (1961), involved a suit brought under the Railway Labor Act, which then prohibited employer discrimination against non-union employees. The defendants, a railroad and several unions, agreed to entry of a consent decree providing that the railroad would not discriminate against non-union employees. The statute was then amended to permit such discrimination in the form of a union shop. Upon request of the unions, the district court refused to modify the consent decree to allow a union shop, reasoning that non-union shops were not illegal and that the parties' agreement should be enforced.

18/ The three dissenting Justices and one concurring Justice in Stotts interpreted this passage from the majority opinion as saying that a consent decree cannot provide relief that would be unavailable after trial. See Stotts, supra, 104 S. Ct. at 2605 n.9 (Blackmun, J., dissenting) ("The Court's analysis seems to be premised on the view that a consent decree cannot provide relief that could not be obtained at trial."); id. at 2594 n.3 (Stevens, J., concurring in the judgment) ("The Court seems to suggest that a consent decree cannot authorize anything that would not constitute permissible relief under Title VII.").

The Supreme Court reversed, holding that to allow the consent decree to continue unmodified "would be to render protection in no way authorized by the needs of safeguarding statutory rights." 364 U.S. at 648. In unequivocal language, the Court made clear that the consent of the parties to a remedial decree cannot empower a court to order relief that is not authorized by the underlying statute. 19/ Noting that "[t]he parties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction" (id. at 651), the Court stated: "In short, it was the Railway Labor Act, and only incidentally the parties, that the District Court served in entering the consent decree now before us. * * * The parties have no power to require of the court continuing enforcement of rights the statute no longer gives" (id. at 651-652) (emphasis added). In the final sentences of the opinion, the Court again emphasized the point (id. at 652-653):

> The type of decree the parties bargained for is the same as the only type of decree a court can properly grant -- one with all those strengths and infirmities of any litigated decree which arise out of the fact that the court will not continue to exercise its powers thereunder when a change in law or facts has made inequitable

19/ The Court quoted its decision in United States v. Swift & Co., 286 U.S. 106, 114-115 (1932): "The result is all one whether the decree has been entered after litigation or by consent. * * * We reject the argument * * * that a decree entered upon consent is to be treated as a contract and not as a judicial act" (364 U.S. at 650-651).

> what was once equitable. The parties could not become the conscience of the equity court and decide for it once and for all what was equitable and what was not, because the court was not acting to enforce a promise but to enforce a statute. 20/

Even if the Supreme Court's decision in System Federation was not binding precedent on the point, the proposition that a court cannot order through a consent decree a type of relief that it would lack power (in contrast to discretion) to order in a

20/ The decisions of the courts of appeals are in accord with System Federation. See Washington v. Penwell, 700 F.2d 570, 574 (9th Cir. 1983) ("The district court's authority to adopt a consent decree comes only from the law the decree is intended to enforce."); United States v. Motor Vehicle Mfr. Ass'n., 643 F.2d 644, 650 (9th Cir. 1981) ("The authority of a federal district court to adopt a consent decree comes only from the statute which the decree is intended to enforce. * * * If there is a 'purpose' to be effectuated, it is the purpose of the statute pursuant to which the government seeks relief."); Cf. United States v. City of Miami, 664 F.2d 435, 441 (5th Cir. 1981) (If the suit seeks to enforce a statute, the [consent] decree must be consistent with the public objectives sought to be attained by Congress."); Williams v. Vukovich, 720 F.2d 909, 923 (6th Cir. 1983) ("A consent decree which seeks to enforce a statute must be consistent with the public objectives sought to be attained by Congress."); Theriault v. Smith, 523 F.2d 601 (1st Cir. 1975) (First Circuit affirmed district court's modification under Rule 60(b)(5), Fed. R. Civ. P., of consent decree where a subsequent Supreme Court decision represented a "fundamental change in the legal predicates" of the decree.) See also Jordan v. School District of Erie, Pa., 548 F.2d 117 (3d Cir. 1977); United States v. Georgia Power Co., 634 F.2d 929 (5th Cir. 1981); Western Union Telegraph Co. v. International Brotherhood of Electrical Workers, Local No. 134, 133 F.2d 955 (7th Cir. 1943). Compare Sansom Committee By Cook v. Lynn, 735 F.2d 1535 (3d Cir. 1984), cert. denied, 53 U.S.L.W. 3365 (U.S. Nov. 13, 1984) (jurisdiction of district court to incorporate state law relief into a consent decree in federal question case); Citizens For A Better Environment v. Gorsuch, 718 F.2d 1117, 1124-1127 (D.C. Cir. 1983), cert. denied, 52 U.S.L.W. 3861 (U.S. May 29, 1984)(district court's power to approve "non-statutory" provisions of consent decree).

fully litigated decree is self-evident and needs no decisional support to sustain it. Congress has, in a number of contexts, expressly limited the remedies available in the federal courts. 21/ For example, the anti-injunction provisions of the Norris-LaGuardia Act impose a number of restrictions on federal court authority to issue restraining orders or injunctions in cases growing out of labor disputes. See 29 U.S.C. 104. Clearly, the parties to a lawsuit brought under the Norris-LaGuardia Act cannot by their consent grant to a federal court remedial power to issue an injunction exceeding the restrictions statutorily imposed by Congress. Similarly, as the Court noted in Stotts, the federal courts "have uniformly held that relief for actual victims does not extend to bumping employees previously occupying jobs" (104 S. Ct. at 2588 n. 11 citing; Patterson v. American Tobacco Co., 535 F.2d 257, 267 (4th Cir.), cert. denied, 429 U.S. 920 (1976); Local 189 United Paperworkers and Paperworkers v. United States, 416 F.2d 980, 988 (5th Cir. 1969), cert. denied, 397 U.S. 919

21/ See, e.g., 29 U.S.C. 104 (anti-injunction provisions of Norris-LaGuardia Act); 28 U.S.C. 2283 (restricting federal court injunctions to stay state court proceedings); 28 U.S.C. 1342 (restricting district court injunctions against public utility rates ordered by state rate-making body). That such statutory limitations on the remedial authority of federal courts is within Congress' authority under Article III, §1, of the Constitution is well-established. See, e.g., Lauf v. E.G. Shinner & Co., 303 U.S. 323 (1938) (upholding anti-injunction provisions of the Norris-LaGuardia Act); Yakus v. United States, 321 U.S. 414 (1944) (upholding provision of Emergency Price Control Act of 1942 prohibiting federal district courts from issuing temporary stays or injunctions).

(1970). Obviously, the "bumping" of incumbent nonminority employees in favor of minority employees could not be judicially imposed pursuant to a consent decree between the alleged discriminators and the discriminatees. It is equally clear, therefore, that the parties to a Title VII action cannot consent to judicial imposition of remedies that exceed the victim-specific limitation congressionally mandated under Section 706(g). 22/

Prior to the decision in Stotts, the remedial use of racially preferential quotas or goals in Title VII cases, without regard to specific victims of discrimination, had been upheld on several occasions by this Court. See, e.g., Culbreath v. Dukakis, supra, 630 F.2d at 23; Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975); Associated General Contractors of Massachusetts, Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974). The Stotts decision thus represents a significant departure from prior interpretations of Title VII by this Court, providing a basis for a challenge to implementation of the Culbreath consent decree that

22/ A divided panel of the Sixth Circuit Court of Appeals recently held that the rule announced in Stotts has no effect on class-based preferential relief contained in a consent decree. Vanguards v. City of Cleveland, No. 83-3091 (6th Cir. Jan. 23, 1985) (copies of opinion lodged with Court clerk). For the reasons discussed herein, as well as those articulated in Judge Kennedy's dissenting opinion in Vanguards, we believe that Vanguards was wrongly decided and should be rejected by this Court.

simply did not exist before Stotts was announced. 23/ Indeed, in Culbreath this Court found that the would-be union intervenors had little likelihood of success on the merits because "racial preference schemes are an accepted means of remedying past discrimination on our society" (630 F.2d at 23). In making a similar finding regarding plaintiffs in this case (App. 139), the district court misread the significance of Stotts on plaintiffs' likelihood of success on the merits. The Stotts case is thus an unusual circumstance militating in favor of allowing plaintiffs to intervene.

B. Plaintiffs Acted Promptly to Protect Their Interests After the Stotts Decision Was Announced and After They Learned that the Consent Decree Would Directly Affect Them

The Stotts decision was announced on June 12, 1984, and approximately one month later, on July 12, 1984, plaintiffs in this case filed their complaint, later deemed a petition to intervene in Culbreath. The plaintiffs thus acted promptly in asserting their rights once they had some basis for believing those rights were implicated, rendering their intervention timely. 24/

23/ Subsequent to the Supreme Court's decision in Stotts, at least two district courts reversed their prior decisions which had afforded preferential treatment to non-victims. See United States v. City of Cincinnati, 35 FEP Cases 676 (S.D. Ohio 1984); Yulsan Pioneers v. N.J. Dept. of Civil Service, 588 F. Supp. 732 (D. N.J. 1984).

24/ We note that the relief provided in the Culbreath consent decree was premised on Title VII (see App. 37-38). The Culbreath defendants stipulated that the Stipulation of Facts submitted by the parties in support of the consent decree and adopted by the court (App. 36-51) "constitute[d] findings of such past practices of discrimination * * * sufficient to sustain an action under Title VII * * *, thereby providing sufficient grounds for the remedies set forth in the Decree" (App. 37-38). Title VII, however, was not in the complaint. Nevertheless, the courts have properly treated Culbreath as a case brought under Title VII because the remedy was entered under Title VII and has been treated as such by the "express or implied consent of the parties." Fed. R. Civ. P. 15(b).

CONCLUSION

For the foregoing reasons, the judgment of the district court denying intervention and dismissing the complaint should be reversed, and the case should be remanded for further proceedings on the merits of the plaintiffs' claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 1985, I served this Brief for the United States as Amicus Curiae on all of the parties to this appeal by having two copies of the brief delivered by Federal Express to each of their counsel, as follows:

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I don't think that this case is getting any press, but I send you the attached anyway.

Background on PVA v. CAB

Event: On March 11, 1985, the United States filed a petition for rehearing and suggestion of rehearing en banc in PVA v. CAB, No. 83-1055, in the United States Court of Appeals for the District of Columbia Circuit. Civil Rights groups may criticize us for this.

I. Background: Section 504 of the Rehabilitation Act prohibits discrimination on the basis of handicap in federally assisted programs and activities. The central issue in this case is whether the assistance the government gives to airports (for building and improvement) should be regarded as assistance to the airlines, or to their "program or activity" of commercial air transportation.

We do not think that airlines which get no actual money from the federal government should be regulated as a "federally assisted program." In 1982, the Civil Aeronautics Board ("CAB") published a regulation for federally assisted airlines. The regulations do not impose §504 obligations on those airlines whose only connection with federal assistance is that they use federally assisted airports. The Civil Rights Division of the Department of Justice has "coordinating authority" with regard to this kind of regulation, and it approved CAB's version.

The Paralyzed Veterans of America ("PVA") and other groups representing the handicapped challenged this regulation in the Court of Appeals for the District of Columbia Circuit. They argued that airlines using federally assisted airports should be treated as "assisted" so that they (the major airlines) would be covered by the nondiscrimination regulation. The court of appeals held, March 18, 1985, that assistance to airports is assistance to airlines, and that the airlines are therefore subject to the Section 504 regulation.

II. Position of the United States: On behalf of the Department of Transportation, the Justice Department has petitioned for rehearing (with suggestion of rehearing en banc). In our view, the court has failed to consider that while airlines use airports, so do all the people who travel on planes. In fact, many businesses depend on air travel; they too use the airports. Congress did not intend that every one who uses the airport be treated as a "recipient of federal financial assistance" subject to government regulation under Section 504 of the Rehabilitation Act.

III. Relationship to Administration Policy: The Administration has consistently tried to ensure that government regulation based on this kind of statute does not extend to entities and activities that are not receiving federal money. Expansion of statutory coverage to include persons or organizations who have never received a dollar of federal revenues unduly imposes federal control and regulation on persons who have never sought nor received funds from the federal government. Such a result is contrary to both the intent of Congress and basic principles of federalism.

IV. Anticipated Criticism and Planned Department of Justice Response:

Criticism: The Reagan Administration is taking a narrow view of the reach of Section 504.

Response: The Administration is interpreting that statute in exactly the manner Congress wrote it, to cover only "recipients" of "federal financial assistance." The airlines at issue in this case do not receive federal funds and it would be contrary to the letter and spirit of Section 504 to deem them "recipients" within the meaning of that statute. To include airlines as "recipients," as the court of appeals does, could lead to the conclusion that virtually everyone is covered by this statute. Such a result is contrary to the basic premise of statutes such as Section 504: only those who willingly accept federal money should be subject to federal regulations.

V. Talking Points:

* The court of appeals was wrong in holding that when DOT makes grants to airports, that constitutes "federal financial assistance" to airlines. Therefore, there is no basis for subjecting most airlines to the detailed rules that do apply to programs receiving federal financial assistance.

* Judicial extension of regulation into areas Congress did not authorize to be regulated is improper.

3/23 10:30 E.W.

- what does OA cover? - everything but WHO

- why was not installed? Question not asked. Should we have been so aggressive.

- "Is there need to determine, need to re-evaluate"

[everybody but OA.]

big Kominski CEA (Carlucci) maybe not as

~~OA~~ primarily but usually anything except WHO.